

**SANITIZED DECISION – 05-662 C & 05-663 U – BY GEORGE V. PIPER, ALJ –
SUBMITTED for DECISION on NOVEMBER 17, 2006 – ISSUED on NOVEMBER
22, 2006**

SYNOPSIS

CONSUMER'S SALES AND SERVICE TAX -- EDUCATIONAL SUMMER CAMP -- TUITION PAYMENTS EXEMPT FROM TAX -- Because athletics, sports training or physical training is not the primary purpose of Petitioner's summer camp and because Petitioner's courses of instruction (many of the same instructional courses provided through formal schooling in the public schools), being educational, intellectual and developmental, occupy a substantial amount of each participant's time while in attendance at the camp, Petitioner qualifies for the exemption provided by to W. Va. Code § 11-15-9(a)(22) [2004], and Petitioner was not, therefore, required to collect consumers' sales and service tax on its tuition receipts. Also see W. Va. Code St. R. §§ 110-15-2.30 *et seq.* (July 15, 1993).

FINAL DECISION

A tax examiner with the Field Auditing Division ("the Division") of the West Virginia State Tax Commissioner's Office ("the Commissioner" or "the Respondent") conducted an audit of the books and records of the Petitioner. Thereafter, on November 3, 2005, the Director of this Division of the Commissioner's Office issued a consumers' sales and service tax assessment against the Petitioner. This assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code. The assessment was for the period of January 1, 2001 through September 30, 2005, for tax of \$, interest, through November 30, 2005, of \$, and no additions to tax, for a total assessed liability of \$. Written notice of this assessment was served on the Petitioner as required by law.

Also, on November 3, 2005, the Commissioner (by the Division) issued a purchasers' use tax assessment against the Petitioner, under the provisions of Chapter 11, Articles 10 and 15A of the West Virginia Code, for the period of January 1, 2000 through September 30, 2004, for tax of \$, interest, through November 30, 2005, of \$, and no

additions to tax, for a total assessed liability of \$. Written notice of this assessment was served on the Petitioner as required by law.

Thereafter, by mail postmarked December 19, 2005, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, petitions for reassessment. *See* W. Va. Code §§ 11-10A-8(1) [2002] and 11-10A-9(a)-(b) [2005].

Subsequently, notice of a hearing on the petitions was sent to the parties and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002] and W. Va. Code St. R. § 121-1-61.3.3 (Apr. 20, 2003).

During the course of the first hearing, Petitioner's counsel admitted for the record that Petitioner is a for-profit camp, and, therefore, he would no longer contest the purchasers' use tax assessment nor would he claim a credit against the purchasers' use tax assessment for out-of-state purchases.

At the conclusion of the first hearing, it was determined by the parties that an additional hearing in, West Virginia would be necessary because a material witness who was instrumental in deciding to assess Petitioner as a recreational summer camp was not in attendance at the hearing held in, West Virginia.

In due course, notice of hearing was sent to the parties and the second hearing was also held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002] and W. Va. Code St. R. § 121-1-61.3.3 (Apr. 20, 2003).

FINDINGS OF FACT

1. During the months of June, July and August of each of the years included in the audit period in question, the Petitioner operated a camp for children in West Virginia.

2. The program of activities at the Petitioner's camp consisted of: (a) twenty-two (22) different activities to promote the campers' intellectual development, including, *inter alia*, painting, newspaper production, photography, radio production, rocketry, theatre, dance, nature study, music, etc.; (b) closely supervised and structured community living experiences to promote the campers' moral development in the areas of self-esteem, leadership, independence, conflict resolution and team building; and (c) twenty-seven (27) different activities to promote the campers' physical development, including, *inter alia*, fishing, hiking, gymnastics, self defense, volleyball, water safety, team sports, etc. (collectively hereinafter "the program activities").

3. The program activities were designed for the express purpose of providing instruction or learning for the intellectual, physical and/or moral development and betterment of the children attending the Petitioner's camp and the improvement of their knowledge, skill and character.

4. The program activities consisted of many of the same instructional courses provided in public schools for children of the same ages as the campers at the Petitioner's camp.

5. Petitioner also has a private tutoring program if requested by a parent, such as in English, math, studying for a child's bar or bat mitzvah, etc. If the requested tutoring is for religious instruction, a separate (nominal) charge would be added, but if the instruction is for English or math, there is no separate charge.

6. The Petitioner's staff was selected based on their formal education, training and experience to qualify them to conduct the program activities.

7. The program activities did not constitute training in athletics, sports training or physical conditioning.

8. The primary scope or purpose of the program activities was not training in athletics, sports training or physical conditioning.

9. The Petitioner charged and remitted consumers' sales and service tax on its charges to the children attending its camp for room, board and purchases of sundry items at the small store it operated there.

10. The Petitioner did not charge or remit consumers' sales and service tax on its charges to the children attending its camp for participation in the program activities there.

11. At the second hearing, Respondent's witness, in response to a series of questions from Petitioner's counsel, admitted that educational activities would include newspaper composition, photography, theatre, dance, singing, glee club, foreign language classes, religious studies, musical instruments, some nature study classes, and water safety instruction.

DISCUSSION

The only issue is whether Petitioner has carried its burden of proof by showing that Respondent erred in determining that petitioner's camp activities did not qualify as the conduct of an educational summer camp for consumers' sales and service tax purposes.

Respondent's counsel correctly argues that, "where a person claims an exemption from a law imposing a license or tax, such law is strictly construed against the person

claiming the exemption.” Syl. Pt. 5, *CB&T Operations Co. v. Tax Comm’r*, 211 W. Va. 198, 564 SE 2d 408 (2002) (Internal quote marks and citations omitted).

The statute imposing the consumers' sales and service tax does indeed provide an exemption for “tuition charged for attending educational summer camps.” W. Va. Code § 11-15-9(a)(22). The term “educational” is defined, in legislative regulations (W. Va. Code St. R. § 110-15) (July 15, 1993), for such purposes as:

§ 2.30.1 ... dedicated to providing instruction or learning for the intellectual, physical and moral development and betterment of the recipient thereof, and the improvement of his knowledge, skill and character. For purposes of these regulations, those courses of study traditionally provided through formal schooling may be presumed to be educational.

§ 2.30.2. Training in athletics, sports training, or physical conditioning shall not be considered “educational” for purposes of these regulations unless the primary scope or purpose of the summer camp is not training in athletics, sports training, or physical conditioning.

It is also provided in the regulations that:

§ 2.30. “Educational summer camp” means a program and facility providing courses of instruction in activities such as art, science, music, computers, foreign languages, forestry, religious study, etc., such courses of instruction occupying a substantial amount of time during which participants are in attendance at the camp. Id. (Emphasis added).

On page 72 of the hearing record, the Director of the Respondent Commissioner’s Legal staff and the same individual who made the decision to issue the consumers' sales and service tax assessment against the Petitioner, testified that so long as sports training or athletic training conditioning is not a primary activity, the above limitation in § 2.30.2 is not applicable, and a camp is still an “educational” camp, (the same conclusion reached by Petitioner).

This tribunal agrees that that the limitation in § 2.30.2. is not applicable, and we also agree with Petitioner that the common and accepted meaning of the term “substantial,” in § 2.30, is “of ample or considerable amount, quantity, size, etc.” Webster’s Encyclopedic

Unabridged Dictionary of the English Language, p. 1418. Explained by contrast, “substantial” is more than *de minimis*. *VEPCO v. Sun Shipbuilding & Dry Dock Co.*, 407 F. Supp. 324 (E.D. Va. 1976). Likewise, as a measure of evidence, “substantial” is “adequate to support a finding” but “less than the weight of the evidence.” *West Virginia Institute of Technology v. West Virginia Human Rights Commission*. 181 W. Va. 525, 383 S.E. 2d 490 (1989). Thus, for a summer camp to qualify as “educational” for these purposes, its program of instruction, etc., must promote the objectives described in the above regulations and occupy a considerable or ample, and not a *de minimis*, amount of the campers’ time.

We also find that Petitioner’s program activities were designed to provide instruction or learning for the intellectual, physical and/or moral development and betterment of the children attending the Petitioner’s camp and the improvement of their knowledge, skill and character. Further, the program activities at the Petitioner’s camp consisted of many of the same instructional courses provided in public schools for children of the same ages as its campers, and Petitioner’s staff was selected based on their formal education, training and experience to qualify them to conduct these same program activities.

Accordingly it is determined that because athletics, sports training or physical training is not the primary purpose of Petitioner’s summer camp and because Petitioner’s courses of instruction (many of the same instructional courses provided through formal schooling in the public schools), being educational, intellectual and developmental, occupy a substantial amount of each participant’s time while in attendance at the camp, Petitioner qualifies for the exemption provided by to W. Va. Code § 11-15-9(a)(22) [2004], and

Petitioner was not, therefore, required to collect consumers' sales and service tax on its tuition receipts. Also see W. Va. Code St. R. §§ 110-15-2.30 *et seq.* (July 15, 1993).

CONCLUSIONS OF LAW

Based upon all of the above it is **HELD** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon a petitioner-taxpayer, to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and W. Va. Code St. R. § 121-1-63.1 (Apr. 20, 2003).

2. The Petitioner-taxpayer in this matter has carried the burden of proof with respect to its contention that as an “educational” summer camp, rather than a recreational camp, it was not required to collect consumers' sales and service tax on its tuition receipts. *See* W. Va. Code St. R. § 121-1-69.2 (Apr. 20, 2003).

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the purchasers’ use tax assessment issued against the Petitioner for the period of January 1, 2000 through September 30, 2004, for tax of \$ and interest of \$, **totaling \$**, should be and is hereby **AFFIRMED**.

Pursuant to the provisions of W. Va. Code § 11-10-17(a) [2002], **interest accrues** on this purchasers' use tax assessment until this liability is fully paid.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumers' sales and service tax assessment issued against the Petitioner for the period of January 1, 2001 through September 30, 2005, for tax of \$ and interest of \$, **totaling \$**, should be and is hereby **VACATED**, and the Petitioner owes no further consumers' sales and service tax liability for the period in question.